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In The

Supreme Court of the United States

October Term, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE HAWAII CONFERENCE OF THE UNITED CHURCH OF CHRIST AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTEREST OF AMICUS 1

II. BACKGROUND 2

III. REASONS FOR GRANTING THE PETITION..... 9

A. THE "PRIMARILY RELIGIOUS"/"PRIMARILY SECULAR" TEST INFRINGES UPON THE RIGHT OF A RELIGIOUS EDUCATIONAL INSTITUTION UNDER THE RELIGION CLAUSES TO DEFINE AND CARRY OUT ITS MISSION FREE FROM GOVERNMENT INTRUSION 9

1. The Ninth Circuit's Test Entangles The EEOC and the Courts in Decisions of a Religious Nature..... 11

2. The Ninth Circuit's Test Improperly Discriminates in Favor of Organizations Owned or Controlled by a Church 14

3. Continued Application of the Ninth Circuit's Test Will Force Religious Organizations to Tailor Their Activities to the Standards of the Court Rather Than to Their Own Religious Needs..... 16

B. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO RESOLVE A CONFLICT IN THE CIRCUITS..... 19

IV. CONCLUSION..... 19

APPENDIX A..... 1a

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. Felton, 473 U.S. 402 (1985) 14

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 9, 11, 14, 16, 17

EEOC v. Kamehameha Schools, 780 F. Supp. 1317 (D. Haw. 1991), Pet. App. B 10

EEOC v. Kamehameha Schools, 990 F.2d 458 (9th Cir. 1993), Pet. App. A 2, 10, 11, 12, 13

EEOC v. Townley Engineering & Manufacturing Company, 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) 9, 12, 16, 18

Fike v. United Methodist Children's Home, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983) 17

Fowler v. Rhode Island, 345 U.S. 67 (1953) 18

Frazee v. Employment Security Dept., 489 U.S. 829 (1989) 15

Hernandez v. Commissioner, 490 U.S. 680 (1989) 14

Larson v. Valente, 456 U.S. 228 (1982) 13, 15

Lee v. Weisman, 505 U.S. ___, 112 S.Ct. 2649 (1992) 15

Lemon v. Kurtzman, 403 U.S. 602 (1971) 11, 14

Murray v. Kobayashi, 50 Haw. 104, 431 P.2d 940 (1967) 3

NLRB v. Catholic Bishop, 440 U.S. 490 (1979) 11

TABLE OF AUTHORITIES – Continued

Page

Virginia Military Institute v. United States, ___ U.S. ___, 113 S.Ct. 2431 (1993)..... 19

Walz v. Tax Comm'n, 397 U.S. 664 (1970)..... 14

STATUTES

42 U.S.C.A. § 2000e-1(a) (West Supp. 1993) 2, 9

42 U.S.C.A. § 2000e-2(e)(2) (West 1981)..... 16

ADMINISTRATIVE DECISIONS

Edgerton, EEOC Determination in Charge No. 370-89-0539 (San Francisco Dist. Off. Dec. 28, 1989), Pet. App. C 3, 10

Puette, EEOC Determination in Charge No. 091-79-1281 (San Francisco Dist. Off. Dec. 29, 1979)..... 3

UNITED CHURCH OF CHRIST DOCUMENTS

Bylaws of the United Church of Christ (1991 ed.)..... 6

The Constitution of the United Church of Christ (1991 ed.) 6, 15

United Church of Christ, Council for Higher Education, *A Statement on Meaning, Purpose, and Standards of the Relationship Among Colleges, Academies and the United Church of Christ*, adopted Nov. 14, 1980.....5, 7, 15

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Marion L. Starkey, *The Congregational Way* (1966)... 4, 7, 18

The Friend, Dec. 1928 ..... 7, 8, 12

The Friend, Jun. 1948..... 5, 12, 18

Ha'ilono O Kamehameha (Employee Newsletter of the Kamehameha Schools), Sept. 1993 8

Gaius Glenn Atkins & Frederick L. Fagley, *History of American Congregationalism* (1942)..... 4, 7

Trustees of the Bishop Estate, *The Kamehameha Schools: an Official Prospectus* (Dec. 23, 1885) 6

Frederick W. Rohlfing, III, *Ruling threatens quality of Kamehameha Schools*, Honolulu Star-Bulletin, Jul. 30, 1993, A-19..... 3

The Kamehameha Schools High School Division, *Self-Study Report* (1975) 8

Albertine Loomis, *To All People: A History of the Hawaii Conference of the United Church of Christ* (1970)..... 4

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I. INTEREST OF AMICUS

The Hawaii Conference of the United Church of Christ ("the Hawaii Conference") has a long-standing relationship with the Kamehameha Schools and a substantial interest in protecting non-profit religious institutions, including schools, from evaluation of their religious sufficiency by the EEOC and the courts.[1]

[1] This *amicus* appears by consent of the parties in accordance with Rule 37.2 of the Rules of this Court. The parties' letters of consent have been filed with the Clerk of the Court.

The Hawaii Conference, the Hawaii state organization of the United Church of Christ, is composed of island associations which are in turn made up of local churches. The Bishop Memorial Church, which serves as the chapel for the Kamehameha Schools and is located on the campus of the schools, is a member church of the Oahu Association of the United Church of Christ.

This case presents an important question regarding the scope of the exemption afforded by Section 702 of the Civil Rights Act of 1964.[2] The central issue is whether the term "religious educational institution" is to be construed *broadly*, so as to allow independent non-profit religious schools to fulfill their religious purposes freely, or whether it is to be construed *narrowly*, so as to subject religious practices at the schools to intense scrutiny by the EEOC and the courts.

If allowed to stand, the decision of the Ninth Circuit[3] will change forever the character of the Kamehameha Schools and other non-profit religious educational institutions which are, similarly, neither owned nor controlled by a church. Either the Kamehameha Schools will lose their character as a religious educational institution, or they will be forced to display their religious nature in such a way as to be hypocritical and offensive to their Protestant – in this case, Congregational – traditions.

II. BACKGROUND

It was certainly a surprise to the Hawaii Conference, as it was to the Hawaii community, to have the Ninth Circuit say the Kamehameha Schools are not a religious educational institution, especially in view of the public perception of the schools, not to mention the consistent relationship between the schools and the Hawaii Conference over the course of more than a century. And it would have been startling, indeed, to their founder, Princess Bernice Pauahi Bishop.

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[2] 42 U.S.C.A. § 2000e-1(a) (West Supp. 1993).

[3] *EEOC v. Kamehameha Schools*, 990 F.2d 458 (9th Cir. 1993), Pet. App. 1a.

The community reaction to this – to us, astonishing – conclusion is perhaps best mirrored in the July 30, 1993, feature *Viewpoint*, written for the *Honolulu Star-Bulletin* by Frederick W. Rohlfing, III, Esq. (who is neither a graduate of Kamehameha nor a member of a Congregational church). The decision, Mr. Rohlfing says, "has disturbing implications for religious freedom . . . [and] will be the termination of an alternative approach to education that has served the people of Hawaii well for more than a century." *See* Rohlfing, *Ruling threatens quality of Kamehameha Schools*, Honolulu Star-Bulletin, Jul. 30, 1993, at A-19, attached as Appendix A.

The Ninth Circuit's conclusion *is* surprising, but the community reaction is not. The religious nature of the schools is well known in the community, and that issue has been the subject of public action in the past. The Hawaii Supreme Court, whose justices appoint the trustees of the Kamehameha Schools, had no difficulty concluding unanimously that the schools fit easily within the religious organization exemption in Hawaii's own anti-discrimination law. *Murray v. Kobayashi*, 50 Haw. 104, 431 P.2d 940 (1967). Indeed, in 1979, the EEOC itself in a case similar to the present one, classified the schools as a "Religious/Educational Institution," and found no basis for upholding the claim of an applicant refused employment because he was not a Protestant.[4]

Even in the present case the EEOC recognizes the religious nature of the Kamehameha Schools: "It is clear . . . that the schools have a religious orientation that is similar to that found in most church-schools."[5] (One is tempted to ask just how much more is required.)

The Kamehameha Schools have been a Protestant educational institution since their beginning in 1887. They were

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[4] *Puette*, EEOC Determination in Charge No. 091-79-1281 (San Francisco Dist. Off. Dec. 29, 1979).

[5] *Edgerton*, EEOC Determination in Charge No. 370-89-0539 (San Francisco Dist. Off. Dec. 28, 1989), Pet. App. 52a n.8.

founded in the traditions and the spirit of the Congregational Mission, which first brought the Gospel to Hawaii in 1820.

CONGREGATIONALISM[6]

The United Church of Christ is a Protestant religious denomination, Congregational in tradition and history.[7] In the Congregational tradition, local churches are interdependent yet autonomous, Christ is the head of the church, and all members are God's priests (hence "the priesthood of all believers"). Congregationalism stresses freedom of conscience and the independence of each congregation in scriptural interpretation. Although cooperating in local associations and regional conferences and in a national general synod, individual congregations retain the right to govern themselves. Modern Congregationalism began about 1550. Congregationalists were a major political force in the American colonies, settling Plymouth Colony in 1620.

Congregationalists have a long history of involvement in education. They established Harvard College in 1636, Yale in 1701, Dartmouth in 1770, Oberlin in 1833 and many more.

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[6] *See generally* Albertine Loomis, *To All People: A History of the Hawaii Conference of the United Church of Christ* (1970); Marion L. Starkey, *The Congregational Way* (1966); and Gaius Glenn Atkins & Frederick L. Fagley, *History of American Congregationalism* (1942).

[7] Congregationalists have been prominent in the ecumenical movement, and the United Church of Christ is the product of a series of denominational unions and mergers. In this century, in 1931, the Congregational Churches merged with the union of three small groups that all used the name "Christian," and the resulting body became the Congregational Christian Churches. The Evangelical and Reformed Church was formed in 1934 by the union of two American churches of German background. The United Church of Christ was formed June 25, 1957, by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States, and the new denomination declared a constitution in force at its Third General Synod on July 4, 1961. The church, which is neither credal nor hierarchical, has about 1.6 million members in the United States, with somewhat smaller followings in Canada, England, Wales, Australia and New Zealand.

The classic Congregational format in founding an institution is to set it up in its own right. Ownership or control of an educational institution is quite foreign to Congregationalism. Just as every local church has the obligation and right of self-determination, so do the educational institutions that are related to the United Church of Christ. The church views its church-school relationship as one of "autonomy and interdependence" and acknowledges that it has more to do with common history, consonance of contemporary mission, and cooperation and partnership than with control or dominance.[8]

PRINCESS BERNICE PAUAHI BISHOP AND HER WILL

Princess Bernice Pauahi was born in 1831, the great granddaughter of Kamehameha I (Kamehameha the Great), who united all the Hawaiian islands. She refused to accept the throne from Kamehameha V, choosing to serve her people rather than to rule them.

The princess, like both her parents, had been raised a Congregationalist. Bernice Pauahi Bishop and her husband, Charles Reid Bishop, were committed members of Kawaiahao Church (a Congregational church, now a member church of the Hawaii Conference), where Mrs. Bishop taught Sunday School and sang in the choir. The Bishop family home, Haleakala, was considered to be "a center of Christian home life." The Friend, Jun. 1948.[9]

Consistent with her strong religious beliefs, Mrs. Bishop provided in her will for the founding of Protestant, non-denominational schools for Hawaiian children. The children were to be taught by Protestant teachers, and the schools were to be administered by Protestant trustees.

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[8] United Church of Christ, Council for Higher Education, *A Statement on Meaning, Purpose, and Standards of the Relationship Among Colleges, Academies and the United Church of Christ*, adopted Nov. 14, 1980.

[9] The Friend is a monthly publication of the Hawaii Conference of the United Church of Christ (and its predecessor organizations).

The will specifically provides that:

> . . . [T]he teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular sect of Protestants . . . the selection [of trustees] to be made from persons of the Protestant religion.

The first trustees were a minister, three lay missionaries, and Mr. Bishop.[10] From their inception in 1887, three years after Mrs. Bishop's death, the Kamehameha Schools were intended to transmit Protestant values:

> The wise provisions of the will in regard to moral and religious training are in full accord with the sentiments of the trustees, who hope to carry out such measures and methods as will tend to make good and industrious citizens, interested in maintaining and developing the principles, usages, and institutions of the highest Christian civilization.

Trustees of the Bishop Estate, *The Kamehameha Schools: an Official Prospectus* (Dec. 23, 1885).

THE KAMEHAMEHA SCHOOLS AS A MODEL OF CONGREGATIONAL EDUCATION

That the Kamehameha Schools are Protestant in nature, rather than sectarian, does not make them non-religious. Indeed, non-denominational Protestant education has always

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[10] The lack of any requirement that the trustees be clergy is wholly consistent with the Congregational tradition. Congregationalism envisions that all church members, not just clergy, determine church doctrine and carry out the mission of the denomination. Every member of a United Church of Christ congregation is expected to personally "participate in and extend the ministry of Jesus Christ." The Constitution of the United Church of Christ, Article V, Section 17 (1991 ed.). For example, lay representatives of the local churches comprise at least half the delegates of the General Synod, the national representative body of the United Church of Christ. Bylaws of the United Church of Christ, Article III, Section 171 (1991 ed.).

been a common feature in Congregational schools and colleges. "Both in theory and practice they were non-sectarian; but they were rooted in Congregational soil and they perpetuated the order which created them." Atkins & Fagley, *supra* note 6, at 236. *Accord* Starkey, *supra* note 6, at 283.

And Kamehameha's organization as a trust independent from direct church control is also typical of Congregational schools. Most school systems and colleges formed by Congregational churches are not owned or controlled by either the denomination or the church that created them.[11] Indeed, at their founding, some schools had perceived "no need of formal relationship between the churches and colleges, for the informal relationship was close and intimate." Atkins & Fagley, *supra* note 6, at 237. To this day, the United Church of Christ envisions its formal relationship with schools as a joining of independent bodies in common belief "without dogmatic or ecclesiastical control." Council for Higher Education, *supra* note 8.

The Kamehameha Schools were established as a model of Protestant education. Theodore Richards, principal of the Kamehameha School for Boys from 1893 to 1898, reported in 1899 that, "To leave out the fact that the School has been intensely Christian, without suggestion of denominationalism, and that teachers have been engaged with this thought uppermost . . . would be to leave out the chief feature of the school and the secret of its success." Ethel M. Damon & Josephine Sullivan, *A Historical View of The Kamehameha Schools, Prepared for the Fortieth Anniversary at the Request of President Frank E. Midkiff*, The Friend, Dec. 1928.

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[11] The typical Congregational practice is to found an institution, set it up in its own right, and then set it free. The preservation of the schools' independence is consistent with the Congregational tradition of preserving the autonomy of its member churches: "The church did not dominate the school; rather, it insisted that the freedom which the church demanded for itself should likewise be enjoyed by the school, and the schools were in fact, as well as in name, free schools." Atkins & Fagley, *supra* note 6, at 230, 231.

The religious mission of the schools is not expressed solely through the curriculum; it has always been expressed through the Protestant environment provided to the students.

> A constant endeavor is made to emphasize the moral, the religious, the distinctively Christian life. Sunday Chapel services, daily Chapel exercises, Sunday Schools, Christian Endeavor and similar groups aid in the religious life. Both the boys and the girls have gone out to Hawaiian Churches to serve as teachers.

The Friend, Dec. 1928, *supra*. In a 1975 Self-Study Report, the Kamehameha Schools noted that the strength of their religious program was that:

> The program meets the students "where they are" in their religious struggle and provides support, if necessary, for students making religious decisions.

The Kamehameha Schools High School Division, *Self-Study Report* (1975), Winegar Affidavit, Exhibit 7.5.

The mission and activities of the Kamehameha Schools continue to transmit Protestant values. In announcing guidelines for the accomplishment of the current mission of the Kamehameha Schools, Myron B. Thompson, chairman of the trustees, stated:

> To accomplish this mission, we will:
>
> - Promote the educational development and growth of all people at Kamehameha Schools/Bishop Estate;
>
> - Foster Protestant religious worship, morals and spiritual values . . .

Ha'ilono O Kamehameha (Employee Newsletter of the Kamehameha Schools), Sept. 1993, p. 1.

As outlined above, the history of the Kamehameha Schools reflects the Congregational traditions upon which the schools were founded and according to which they continue to operate. In keeping with their religious heritage, the Kamehameha Schools have always provided a Protestant education to the children under their care. That is what Mrs.

Bishop intended over a century ago, and that is what is still happening today.

III. REASONS FOR GRANTING THE PETITION

A. THE "PRIMARILY RELIGIOUS"/"PRIMARILY SECULAR" TEST INFRINGES UPON THE RIGHT OF A RELIGIOUS EDUCATIONAL INSTITUTION UNDER THE RELIGION CLAUSES TO DEFINE AND CARRY OUT ITS MISSION FREE FROM GOVERNMENT INTRUSION.

This case concerns the definition of the term "religious educational institution" and whether a court may permissibly scrutinize the mission, purpose, character, rituals, and teachings of an institution so as to minimize the religious – as compared with the secular – nature of the institution.

Section 702 provides an exemption for religious educational institutions which allows them to discriminate on the basis of religion. This Court has stated that Section 702 "is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[12]

Section 702 does not define the term "religious educational institution."[13] Although the lower courts have not developed a consensus on the proper interpretation of this term, the Ninth Circuit has now announced a "primarily religious"/"primarily secular" test. This test provides that "[a]ll significant religious and secular characteristics must be weighed to determine whether the [institution's] purpose and character are primarily religious."[14]

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[12] *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987).

[13] 42 U.S.C.A. § 2000e-1(a) (West Supp. 1993).

[14] *EEOC v. Townley Engineering & Manufacturing Company*, 859 F.2d 610, 618 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

In applying the "primarily religious"/"primarily secular" test in this case, the Ninth Circuit did not hold that the Kamehameha Schools are not religious; on the contrary, the court acknowledged that the schools have religious characteristics.[15] Instead, the Ninth Circuit decided that the Kamehameha Schools are not religious *enough*. By whose standards? Not the schools'. Not Mrs. Bishop's. But those of the Ninth Circuit Court of Appeals. This determination clearly violates the Establishment and Free Exercise Clauses because it constitutes government interference with the ability of the schools, as a religious educational institution, to define and carry out their mission.

If the government or the courts are allowed to employ this "primarily religious"/"primarily secular" test, they will (1) scrutinize and monitor the religious activities of religious entities, (2) favor those entities owned or controlled by organized religions, and (3) force independently-run religious schools and other non-profit religious entities to engage only in activities which *appear* religious – and which can easily be characterized as religious – whether or not such activities are consistent with the beliefs and practices of the particular entity.

In this case, the Ninth Circuit emphasized the fact that the Kamehameha Schools do not seek to convert their non-Protestant students to Protestantism, as if that somehow belies

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[15] Among the characteristics acknowledged in the Ninth Circuit's decision are mandatory chapel, mandatory Sunday religious services for boarders, religious instruction, education in comparative religion, daily classroom prayer, grace before meals, publication of Bible verses in the daily bulletin, and prayer before athletic events. See the court's discussion of purposes, faculty, student activities, curriculum, etc. contained in Pet. App. 8a-12a. The court also acknowledged that "[s]ome official school activities have religious overtones." *EEOC v. Kamehameha Schools*, *supra* note 3, Pet. App. 10a. Both the District Court and the EEOC came to a similar conclusion. "It is clear . . . that the schools have a religious orientation that is similar to that found in most church-schools." *Edgerton*, *supra* note 5. *See also EEOC v. Kamehameha Schools*, 780 F. Supp. 1317, 1325 (D. Haw. 1991), Pet. App. 35a.

a religious mission (*EEOC v. Kamehameha Schools*, *supra* note 3, Pet. App. 10a). But it is not the role of the schools to make Protestants, nor is it the role of the court to be telling the schools how to carry out their brand of Protestantism. The role of the schools, as conceived by Mrs. Bishop, is *to inculcate Protestant values*, not to manufacture Protestants. Different people show their religiousness in different ways. That is why we have the First Amendment: to respect and protect those differences.

1. The Ninth Circuit's Test Entangles The EEOC and the Courts in Decisions of a Religious Nature.

The Religion Clauses forbid "programs, whose very nature is apt to entangle the state in details of administration." *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). For this reason, this Court has consistently cautioned the lower courts to interpret statutes in a way that minimizes government's entanglement in the internal operations of religious organizations. *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979).

But the "primarily religious"/"primarily secular" test *requires* just such entanglement because of the difficulty of determining – especially for an outsider – whether the essential nature of an activity is religious or secular:

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing entanglement in religious affairs.

Amos, 483 U.S. at 343, Brennan, J., concurring.

The present case illustrates the dangers of such searching analysis. The Ninth Circuit's examination of the religious practices of the Kamehameha Schools and its determination in this case that the practices are "either essentially secular, or

neutral as far as religion is concerned,"[16] is an attempt to define what is religious and what is not.[17]

Whether a school is secular or religious cannot be determined by some method of superficial sorting and classification. On the contrary, religious nature is subtle, implicit, and pervasive; it comes from attitude and character and commitment to tradition reflected in the acts and supervision of those who teach in and operate the school. "That their moral and religious education will also be efficiently cared for needs no better guaranty than the character of the Trustees, and the earnest and able Christian energy of the Principal." The Friend, Dec. 1887, *reprinted in The Beginning*, The Friend, Jun. 1948. To be sure, the two most important safeguards for maintaining the integrity of the mission of a school are the composition of its board of trustees and the composition of its faculty.

Contrary to the Ninth Circuit's assumption, it is not possible – at least in the context of Congregational teachings – to sift out "secular" education from "religious" or to draw a bright line between them. The transmission of Protestant values is the product of the blending of subtle threads that are woven across the broad fabric of the institution. It is not something that can be counted and totalled up like so many sparrows on a fence: "The religious educational program of the Kamehameha Schools . . . includes not only the work directly under the Chaplain, but all character education within the Schools. . . . " Frederic B. Withington, *Bishop Memorial Chapel at the Kamehameha Schools*, The Friend, Dec. 1928.

Thus, where a court or agency attempts to determine the religious nature of a school like Kamehameha, it must engage

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[16] *EEOC v. Kamehameha Schools*, *supra* note 3, Pet. App. 6a.

[17] Judge Noonan observed, writing in dissent in *Townley*: "The agency and court appear to assume that there must be a sharp division between secular activity and religious activity. . . . But of course such a dichotomy is a species of theology. The theological position is that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time." 859 F.2d at 624-25.

in an analysis of the most intimate aspects of the school and assess how prominent the religious elements are compared to the secular. This type of searching analysis necessarily constitutes the kind of First Amendment intrusion prohibited by *Catholic Bishop*.

Moreover, the government's scrutiny of and entanglement in the affairs of the schools will not end at the termination of this case. If Kamehameha were to lose this case, it would still be bound by the express terms of Mrs. Bishop's will to hire only teachers of the Protestant religion. As a result, Kamehameha would have to make any and all changes necessary to satisfy the Ninth Circuit that it is a religious educational institution and therefore may properly continue to hire only Protestant teachers.[18] The resulting organization would, no doubt, be a religious educational institution. Indeed, it would be a *Ninth Circuit* religious institution. But it would not be a Congregational institution. And it would not be Mrs. Bishop's institution.

Even if the trustees take all these steps, because the Ninth Circuit's opinion places the burden on the Kamehameha Schools to prove their religious nature,[19] Kamehameha will be compelled to continue to demonstrate to the satisfaction of the EEOC that the schools remain religious *enough*. Indeed, will Kamehameha therefore be compelled to ask the EEOC

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[18] In effect, the Ninth Circuit's opinion implies that the schools must formally affiliate themselves with a religion or denomination, hire ordained clergy into administrative positions, convert non-Protestant students to a Protestant denomination, review the religious affiliations of its teachers, rewrite job and curriculum descriptions to advertise the existing Protestant nature of the education currently being offered at Kamehameha, etc.

[19] *EEOC v. Kamehameha Schools, supra* note 3, Pet. App. 4a. Placing this burden of proof on the Kamehameha Schools may in itself be contrary to First Amendment requirements: " . . . [A] considerable burden is on the state, in questioning a claim of a religious nature. Strict or narrow construction of a statutory exemption for religious organizations is not favored." *Larson v. Valente*, 456 U.S. 228, 243 (1982) (quoting *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957)).

for guidance regarding how the schools may be found to be religious *enough* for purposes of Section 702?

This continuing, coercive governmental scrutiny of the exercise of Kamehameha's religious activities conflicts with Section 702's purpose "to minimize governmental interference with the decision-making process in religions." *Amos*, 483 U.S. at 336. The clear weight of First Amendment jurisprudence indicates that a procedure which contemplates "pervasive monitoring" for "the subtle or overt presence of religious matter" is constitutionally suspect. *Aguilar v. Felton*, 473 U.S. 402, 413 (1985). *See also Hernandez v. Commissioner*, 490 U.S. 680, 694 (1989); *Walz v. Tax Comm'n*, 397 U.S. 664, 676 (1970); *Lemon*, 403 U.S. at 650. Accordingly, the "primarily religious"/"primarily secular" test and the scrutiny it inevitably requires create the sort of entanglement the First Amendment prohibits.

In sum, the "primarily religious"/"primarily secular" test entangles the EEOC and the courts in a determination of whether the religious activities of a religious organization are indeed religious and contemplates that the organization must continue to bear the burden of proving that its activities remain "primarily religious." Until this Court furnishes positive guidance defining the permissible scope of determinations of the religious nature of an independent non-profit school, the EEOC and the courts will continue to intrude upon the internal processes by which a religious school defines its mission.

2. The Ninth Circuit's Test Improperly Discriminates in Favor of Organizations Owned or Controlled by a Church.

The Ninth Circuit suggested that, because the Kamehameha Schools are not "wholly or partially owned by a church" (*EEOC v. Kamehameha Schools, supra* note 3, Pet. App. 7a), they cannot be considered religious *enough* to merit the Section 702 exemption. However, ownership is irrelevant. Like most schools of secondary or higher education formed under Congregational auspices, Kamehameha is a non-profit

independent, non-denominational Protestant organization. It is not owned or controlled by any church and promotes religious tenets common to all Protestants.[20] Indeed, even if the Kamehameha Schools were formally affiliated ("in covenant") with the United Church of Christ, the denomination would still neither own nor control the schools.

The covenant between the United Church of Christ and its affiliated schools envisions "allegiance to freedom of intellectual inquiry without dogmatic or ecclesiastical control." Council for Higher Education, *supra* note 8. *See discussion, supra* note 11. Indeed, even if the Kamehameha Schools were themselves a member *church* of the United Church of Christ, the denomination would still exert no binding doctrinal control over them. Such control would be wholly inconsistent with Congregational tradition: "The autonomy of the Local Church is inherent and modifiable only by its own action." *The Constitution of the United Church of Christ*, Article IV, Section 15.

The presence or absence of formal ties to an organized religion is also irrelevant: "[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Frazee v. Employment Security Dept.*, 489 U.S. 829, 834 (1989) (Frazee's beliefs were recognized as religious despite the fact that he belonged to no formal church and subscribed to no particular tenet of Christianity). Neither may a test operate to the advantage of organized religions over less organized ones: "The clearest command of the Establishment Clause is that one religion cannot be officially preferred over another." *Larson*, 456 U.S. at 244.

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[20] There can be no doubt that Protestantism is a religion for the purposes of Section 702. Even so broad a body of belief as the "Judeo-Christian tradition" is considered "religion" for First Amendment purposes. *See Lee v. Weisman*, 505 U.S. ___, ___, 112 S.Ct. 2649, 2656-57 (1992) (prayers given at school graduation ceremony held to be an establishment of religion even though the prayers were based on nothing more specific than the "Judeo-Christian tradition").

In any event, the issue of ownership or control cannot form the basis for distinguishing religious from secular institutions. So long as the Kamehameha Schools offer an education that continues to reflect their historical Protestant attitudes, character, traditions, and values, the question of who owns or controls the schools is irrelevant.

Mrs. Bishop made religion – in this case Protestantism – a part of the mission of the schools. Kamehameha is no less *religious* than a church that – through its school – has made education part of its mission. To hold otherwise, as the Ninth Circuit seems to have done in this case, is to exalt form over substance, to accord a premium to the accident of ownership or control, rather than to respect an institution for the mission with which it has chosen to define itself.

Until this Court furnishes positive guidance to the lower courts regarding the proper interpretation of Section 702, religious educational institutions that are not owned or controlled by a church or that do not have "extremely close ties" to organized religion will suffer a burden which other religious educational institutions need not bear.[21]

3. Continued Application of the Ninth Circuit's Test Will Force Religious Organizations to Tailor Their Activities to the Standards of the Court Rather Than to Their Own Religious Needs.

The "primarily religious"/"primarily secular" test envisions that "each case must turn on its own facts." *Townley*, 859 F.2d at 618. This sort of case-by-case analysis gives rise to a significant "danger of chilling religious activity." *Amos*, 483 U.S. at 344 (Brennan, J., concurring). Under the Ninth Circuit's test, every time a complainant is denied employment

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[21] Moreover, as discussed on page 11 of the petition, the Ninth Circuit's decision in the present case essentially nullifies Section 702's "religious educational institution" exemption by limiting it to schools already covered by Section 703 of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(e)(2) (West 1981), i.e., those owned or controlled by a church.

at a religious school on the basis of the applicant's religion, the EEOC must scrutinize the school's records to ascertain whether the school's religious practices are *sufficiently* religious to outweigh its secular aspects. A religious educational institution risks losing its exempt status at some undefinable point at which the EEOC or a court determines that the "general picture" (*EEOC v. Kamehameha Schools, supra* note 3, Pet. App. 5a) of the school turns from primarily religious to primarily secular.[22]

A religious educational institution wishing to avail itself of Section 702 would therefore be compelled to *appear* as "religious" as possible:

> While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there can be no genuine dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well.

Amos, 483 U.S. at 343-44 (Brennan, J., concurring).

> Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and its sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Amos, 483 U.S. at 336 (Opinion of the Court).

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[22] A religious institution may discontinue its religious activity and thereby lose its religious character for Section 702 purposes. *Fike v. United Methodist Children's Home*, 547 F. Supp. 286, 289-290 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983). By contrast, the "primarily religious"/"primarily secular" test may characterize an institution as "secular" even if it still engages in religious activity.

Continued use of the "primarily religious"/"primarily secular" test would force non-profit entities like the Kamehameha Schools to exaggerate the outward manifestation of their religious nature in order to avoid or prevail in litigation.[23] Any such exaction would in effect dictate which practices constitute religion and which do not and would force the non-profit organization to adopt practices a federal court would consider "religious."[24] Faiths which prefer subtler means of transmitting their beliefs would find this requirement particularly indigestible. In *Fowler*, this court recognized that the protection of the Free Exercise Clause extends to a sect whose "religious service is less ritualistic, more unorthodox, less formal than some." 345 U.S. at 69.

The very nature of Congregationalism makes it suspect under the Ninth Circuit's laundry-list approach. The Congregational tradition grew out of the austere Calvinist-Puritan tradition. "The devout Pilgrims and Puritans of the first days . . . needed no colorful ritual, no adornments in the plain meetinghouses where they worshiped [sic]." Starkey, *supra* note 6, at 6. A school founded in the Congregational tradition necessarily achieves its ends through subtle and implicit means. A requirement that the school prominently advertise its religious nature through overt action or blunt language tailored to the myopic senses of the bureaucrat would most certainly offend the Congregational notion of an impact on the community which is "constructive and meaningful, withal gentle and restrained." *The Future*, The Friend, Jun. 1948.

The "primarily religious"/"primarily secular" test will force religious institutions to advertise their religious nature for the benefit of a bureaucracy or a court and not in response

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[23] "Such establishment, such forcing of a governmentally chosen form upon religious activity, is incompatible with the Religion Clauses." *Townley*, 859 F.2d at 623 (Noonan, J., dissenting), (in reference to a case where Massachusetts attempted to force Baptists to incorporate under state law).

[24] "[I]t is no business of the courts to say what is a religious practice or activity for one group is not religion." *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

to their own religious beliefs. Unless this Court gives positive guidance concerning the proper interpretation of Section 702, the EEOC and the courts will improperly influence – indeed, dictate – religious activity in religious educational institutions.

B. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO RESOLVE A CONFLICT IN THE CIRCUITS

In contrast to the *narrow* reading the Ninth Circuit accorded it in this case, the Third and Fifth Circuits have both held plainly that Section 702 should be construed *broadly*. (*See discussion* Pet. 12-15.)

This Court should grant certiorari in order to resolve this conflict in the circuits and in order to prevent the Kamehameha Schools from having to abandon the central component of the institutional character they have maintained for over a century.[25]

The preservation of the schools' religious mission and the fortunes of the youngsters who come hereafter should not be the product of some accident of geography.

IV. CONCLUSION

Over a century ago, Princess Bernice Pauahi Bishop prescribed a religious mission for the Kamehameha Schools. The right to define that religious mission and to determine how to implement it is the inherent business of the schools.

Mrs. Bishop would indeed be appalled at the suggestion that the schools she founded are not a religious educational institution. They are religious in just the way she wanted them to be: Protestant, in the classic Congregational tradition in

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[25] Whether Kamehameha is a religious educational institution is an issue that should receive the attention of this Court before, rather than after, an institution as venerable as Kamehameha is compelled to transform itself. *Cf. Virginia Military Institute v. United States*, ___ U.S. ___, 113 S.Ct. 2431 (1993) (opinion of Justice Scalia respecting the denial of a petition for writ of certiorari).

which she grew up. She had a right to define their religious mission as she chose then, just as the trustees have an obligation to maintain that mission today.

And the First Amendment protects both such efforts.

For the foregoing reasons, this *amicus*, the Hawaii Conference of the United Church of Christ, respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

Frederick W. Rohlfing III, *Ruling threatens quality of Kamehameha Schools*, Honolulu Star-Bulletin, Jul. 30, 1993, at A-19.

A recent Ninth Circuit Court of Appeals decision directing the Kamehameha Schools to end their Protestant-only hiring policy for teachers has disturbing implications for religious freedom. The effect of the court's ruling will be the termination of an alternative approach to education that has served the people of Hawaii well for more than a century. More generally, the court's decision will result in an unwarranted entanglement of government in religious matters.

In establishing the policy of hiring only Protestant teachers at the Kamehameha Schools, Princess Bernice Pauahi Bishop sought to provide students with, as stated in her will, a means for "instruction in morals and in such useful knowledge as may tend to make good and industrious men and women."

The issue before the Ninth Circuit was whether this policy of hiring only Protestants as teachers fell within a federal civil rights law exemption accorded to religious educational institutions in "employment of individuals of a particular religion to perform work connected with the carrying on by such" educational institutions of their activities.

The Ninth Circuit ruled that the schools were not covered by the exemption, and therefore can no longer hire only Protestants as teachers, because "the general picture of the schools reflects a primarily secular rather

than a primarily religious orientation." The court made this ruling despite its acknowledgment that the schools:

- Have a chaplain who teaches religious education at the schools and who serves as pastor of the Bishop Memorial Church, located on campus in a structure owned by the schools;

- Have teachers in kindergarten through eighth-grade lead their classes in daily prayer;

- Have all boarding students say grace before dinner and athletic teams pray before games;

- Require all boarders to attend services held every Sunday during the school year at the Bishop Memorial Church; and

- Require each student to fulfill a religious education requirement.

Kamehameha Schools takes a moderate approach to religious instruction – and it was ironically this very moderation that the Ninth Circuit used to find Kamehameha Schools outside of the circle of educational institutions exempt from the civil rights law forbidding employment decisions based upon religion. In its decision, the court cited what it called "secular characteristics" of the schools, which it said included:

- The schools not being controlled or supported by a religious organization and not being affiliated with any specific denomination of Protestants;

- The supposed failure of the schools to neither require "teachers to maintain active membership in a church," nor to "inquire into the substance of a teacher's

beliefs or the extent to which teachers integrate those beliefs into their work;"

- The fact that "less than one-third of the 'on-campus' students are Protestants;"

- The schools' disavowal of "any effort to convert non-Protestant students."

Most disturbingly, the Ninth Circuit has put itself in the position of deciding just what constitutes "religious practices." Justice William O. Brennan [sic], one of the U.S. Supreme Court's greatest advocates of civil liberties, went on record opposing the approach now adopted by the Ninth Circuit to determine whether the religious exemption to the civil rights law applies to an institution's employment decisions.

In the case Corporation of the Presiding Bishopric [sic] vs. Amos, a 1986 decision, the high court upheld the right of a church to dismiss an employee of a gymnasium owned by the church because the employee had failed to meet the church's religious criteria. Brennan agreed with the majority decision in Amos finding the church exempted from the 1964 Civil Rights Act.

In his concurrence, Brennan explained that while he opposed religious organizations giving preference based upon religious standards in what he would consider secular work, he saw a much greater danger in courts becoming involved in distinguishing between secular and religious work. He voiced concern that the application of a religious-secular distinction by courts would require a "searching case-by-case analysis" that would lead to

"considerable ongoing government entanglement in religious affairs."

He pointed out that a religious organization, in order to avoid litigation, would then "have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing others tasks as well." As a result, Brennan said, the religious "community's process of self-definition would be shaped in part by the prospects of litigation."

A review of the Ninth Circuit's decision regarding Kamehameha Schools shows that Brennan's fears were justified. By its own admission, the court found it necessary to conduct a wide-ranging inquiry into the religious orientation of Kamehameha Schools in order to decide whether it was a secular or religious institution. In approving governmental inquiry into the religiousity [sic] of the schools, the Ninth Circuit ignored the free-exercise-of-religion clause of the U.S. Constitution.

Justice Brennan's concurrence in Amos provides a highly workable framework for courts in cases where a potential infringement of religious freedom exists. He said simply that the non-profit status of an organization gives it credibility when it asserts that its activities are "infused with a religious purpose." The absence of a profit motive should be sufficient evidence of a religious orientation to make an institution exempt from undue legal interference. Justice Brennan therefore concluded that nonprofit organizations claiming a religious dimension should have a categorical exemption from the general prohibition of religious discrimination in employment.

The Princess endowed the Kamehameha Schools in order to provide a first-rate education to children of native Hawaiian ancestry, and to transmit the religious values she held dear to succeeding generations. The exercise of that legacy certainly falls within any reasonable definition of religious freedom – yet the hiring practices specified in her will, practices that have served Hawaii's community well for generations, are now forbidden, according to the Ninth Circuit.

It should be the earnest hope of all who value the religious freedom protected by the Bill of Rights that the Ninth Circuit's unwise decision will be reversed by the U. S. Supreme Court.

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